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## **Choosing One's Family: Can the Legal System Address the Breadth of Women's Choices of Intimate Relationships**

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# GENERAL ARTICLE

## CHOOSING ONE'S FAMILY: CAN THE LEGAL SYSTEM ADDRESS THE BREADTH OF WOMEN'S CHOICE OF INTIMATE RELATIONSHIP?

BARBARA J. COX\*

### INTRODUCTION

When speaking of family, the immediate assumption made in our society is that one is speaking of the traditional nuclear family. Family is usually defined as persons related by blood, marriage or adoption and the traditional nuclear family consists of a husband, a wife and their children.<sup>1</sup> This definition is so accepted that virtually no one, regardless of political belief or ideology, has felt the need to define the term.<sup>2</sup>

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1. M.J. BANE, *HERE TO STAY: AMERICAN FAMILIES IN THE TWENTIETH CENTURY* 37 (1976). The traditional nuclear family is characterized by independent economic resources and complete autonomy within the husband-wife, parent-child unit. Yorburg, *The Nuclear Extended Family: An Area of Conceptual Confusion* 6 J. COMP. FAM. STUD. 5, 7 (1975). While the nuclear family is the family unit most protected by Western society and the legal system, the modified nuclear family is also common in industrialized societies. *Id.* at 12. The modified nuclear family is characterized by independent economic resources, nuclear family autonomy, weak kin network influence, and regular but not daily contact. *Id.* at 7. The modified extended family is characterized by nuclear family autonomy but also strong kin network influence where members live in close physical proximity and physical contact occurs daily. *Id.* at 8. Rather than the true extended family with its total economic and psychological interdependence, when the term traditional extended family is used in this Article, it refers to the modified nuclear or the modified extended family.

2. *But see* Olsen, *The Politics of Family Law*, 2 L. & INEQUAL. J. 1 n.1 (1984); Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1138; Minow, *Forming Underneath Everything That Grows: Toward a History of Family Law*, 85

From Catherine MacKinnon<sup>3</sup> to the White House Commission on the Family,<sup>4</sup> family has been assumed to be so clearly defined as to need no further definition. In researching the definition of family, article after article made references to "the family" without any attempt by the author to define the term or even to state that the term was so clear as to not need definition.

This presumption negates the reality that is encountered by those who disregard the social and legal definition of family when forming their intimate relationships. The current legal definition of family significantly impacts and harms these people whose families fall outside the accepted norm. Three years ago, I wrote an article which extensively detailed and analyzed the legal consequences of defining family to include only the traditional nuclear family.<sup>5</sup> Families outside the accepted definition are denied benefits and protection frequently taken for granted by the traditional nuclear family. The benefits and protection received by traditional nuclear families are part of an extensive web of legal and social supports and privileges.<sup>6</sup> They include the right to live

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Wis. L. REV. 819, 825 n.14 (1985).

3. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS: J. OF WOMEN IN CULTURE & SOC'Y 515, 524-525 (1982). From the context of the article, it is clear that MacKinnon is referring to the patriarchal family. See *infra* note 18. But MacKinnon's decision not to define "family" is all the more conspicuous because of her usual tendency to carefully explain her terms. For example, see the dedication and notes 1, 2 and 3 of that same article.

4. Dzodin, *In What Form Will The American Family Survive: How the White House Conference Addressed the Question*, 3 FAM. ADVOC. 16 (Fall, 1980).

5. Cox, *Alternative Families: Obtaining Traditional Family Benefits Through Litigation, Legislation and Collective Bargaining*, 2 WIS. WOMEN'S L.J. 1 (1986).

6. Due to limited space, this Article does not discuss the extension of all traditional family benefits to alternative families. Exclusion of these benefits from this discussion is not intended to imply that these benefits should not also be extended to alternative families. They should be. These benefits include favorable income and inheritance tax benefits, eligibility for state and federal entitlement programs, intra-family privileges in law suits, and intra-family property and support issues. This discussion is omitted in part because of preemption issues that arise concerning a municipality's ability to address these issues. See Cox, *supra* note 5, at 49. For a discussion of some of these issues, see Lovas, *When is a Family not a Family? Inheritance and the Taxation of Inheritance within the Non-Traditional Family*, 24 IDAHO L. REV. 353 (1987-88); articles cited in Kondoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 GEO. L.J. 1829, 1833 n.19 (1987); Note, *Property Rights of Same-Sex Couples: Toward A New Definition of Family*, 26 J. FAM. L. 357 (1987-88). Additionally this Article also does not discuss the benefit of suing for loss of consortium, workers' compensation or unemployment compensation even though these benefits have been won on a case-by-case basis by some alternative families. For a discussion of these issues, see Cox, *supra* note 5, at 40-46. However, the California Supreme Court has recently denied heterosexual cohabitants the right to bring a cause-of-action for negligent infliction of emotional distress or loss of consortium. *Elden v. Sheldon*, 46 Cal.3d 267, 250 Cal. Rptr. 254, 758 P.2d 582 (1988). For an excellent critique of the court's decision, see the dissenting opinion of Justice Broussard. 46 Cal. 3d at 279-286, 250 Cal. Rptr. at 262-267, 758 P.2d at 590-595 (Broussard, J., dissenting).

together in single family neighborhoods,<sup>7</sup> the right to receive employment-based benefits such as family health insurance and use of bereavement and sick leave for family members' deaths and illnesses,<sup>8</sup> the

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7. See Cox, *supra* note 5, at 11-27. Virtually every community in the United States has enacted zoning ordinances that establish residential neighborhoods restricted to single families. In *Belle Terre v. Boraas*, 416 U.S. 1 (1974), the United States Supreme Court upheld the Village of Belle Terre's definition of family as individuals related by blood, marriage or adoption or as two unrelated individuals despite a challenge by six unrelated individuals that it was unconstitutional. *Id.* at 6. The Supreme Court did not address the issue of whether unrelated individuals who were members of alternative families could also be excluded under such a zoning ordinance. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 985-90 (1978). Three years later, the Court struck down an ordinance which excluded a traditional extended family consisting of a grandmother, her son, and her two grandsons (who were cousins) from a single-family neighborhood. *Moore v. East Cleveland*, 431 U.S. 494 (1977). The Court declared the ordinance was unconstitutional because it "sliced deeply into the family." *Id.* at 498.

While the Supreme Court has not been faced with the question of whether alternative families can challenge local zoning ordinances that define family so as to exclude them from single-family neighborhoods, some lower courts have rejected claims by alternative families to a constitutional right to live in these neighborhoods. See *New Jersey v. Baker*, 405 A.2d 368, 379 (N.J. 1979) (Mountain, J., dissenting) and the cases cited therein. However, many lower courts, since *Belle Terre* and *Moore* have specifically granted alternative families the right to live in single-family neighborhoods on a state constitutional basis. See *Charter Township of Delta v. Dinolfo*, 351 N.W.2d 831 (M.I. 1984); *McMinn v. Town of Oyster Bay*, 498 N.Y.S.2d 128, 488 N.E.2d 1240 (N.Y. 1985) (under state constitutional due process clause, use of traditional family for determining permissive occupancy both over-inclusive and under-inclusive); *City of Santa Barbara v. Adamson*, 27 Cal.3d 123, 164 Cal. Rptr. 539, 610 P.2d 436 (1980) (used state constitutional right to privacy to prevent restriction on number of unrelated individuals who could live in single-family neighborhood). For a further discussion of this issue, see Richards, *Zoning for Direct Social Control*, 1982 DUKE L.J. 761 (discussing zoning ordinances with family restrictions).

Alternative family members encounter other forms of discrimination in housing as well. For example, the University of California prohibits unmarried heterosexual, gay, and lesbian couples from applying for married student housing on its campuses. Thus, they are denied another benefit regularly extended to the traditional nuclear family. *Los Angeles Times*, February 12, 1989, at 26, col. 3.

8. Of all the areas where traditional nuclear families are protected and granted benefits, the protection and benefits obtained through one's employment tend to be the most significant, at least of those not requiring major state or federal government policy changes. Such significant government policy changes would include letting alternative families file tax returns as a family; changing state laws on marriage, divorce, child custody and support to recognize alternative families; and treating alternative families equally to traditional nuclear families for the purposes of obtaining government benefits.

Perhaps the best way to establish the breadth of employment-based benefits that traditional nuclear families receive and that alternative families do not receive is to quote from Teresa Friend and Pamela Liberty's pamphlet on obtaining employment benefits for gay and lesbian couples:

Maria and Ellen have been together for eight years. They live together and share expenses. Three years ago, when Maria was transferred to San Francisco, Ellen left her job in Chicago to accompany her. A few months ago, Ellen was inseminated and the couple are [sic] expecting a child in about

right to visit family members in hospitals and authorize their medical treatment in emergencies,<sup>9</sup> and the right to receive discounted family

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three months. Maria is an accountant for a medium-sized San Francisco firm. Ellen works part-time as a librarian for a local community college. Because Ellen works part-time, she does not receive any of the medical or dental benefits provided to full-time employees of the library. Like all same-sex couples, Maria and Ellen cannot marry, though they would if they could.

Maria wants to cover Ellen as her dependent on her employer's health and dental care plan. When the baby is born, Maria will also want coverage to extend to him or her. Further, since her progressive San Francisco firm offers both paternity and maternity—or "parenting"—leave, she wants some time off when the baby comes. Her company (not *that* progressive, after all) has denied all of these requests.

Ellen does not get medical benefits from her employer, but she does get library privileges and a pass to the school's gym for herself and her family. She has tried to get the school to allow Maria use of those facilities as her family member, but to no avail.

T. FRIEND & P. LIBERTY, *RECOGNIZING LESBIAN AND GAY FAMILIES: STRATEGIES FOR EXTENDING EMPLOYMENT BENEFIT COVERAGE 1* (Lesbian Rights Project, San Francisco, CA 1985).

One characteristic, however, that until very recently applied to all these employer-sponsored benefit programs, was that they were only provided to members of the traditional nuclear family. However, some progress has been made in recent years and alternative family benefits are now available from a limited number of employers, organizations, and municipalities. See Cox, *supra* note 5, at 33-39 for a discussion of some of the plans currently in effect.

Since my earlier article was published, Santa Cruz, California and the School District of Berkeley, California have also passed legislation extending benefits to the domestic partners of their employees. Additionally, the University of California is considering amendments to its personnel policies. These amendments would allow an employee to use up to thirty days of sick leave and five days of bereavement leave for the sickness or death of "any other person for whom there is a familial-like obligation who is residing in the employee's household." See Memo of Quelda Wilson, Office of the Assistant Vice Chancellor-Personnel (June 27, 1988). The positive results that will accompany this type of benefit extension can be seen from the situation encountered by the Mayor of Laguna Beach, California, Robert Gentry. Mayor Gentry was also a University of California employee. When his male partner became ill with AIDS, Gentry asked for time off to care for his partner, which was allowed to employees whose traditional family members were ill. His request was denied. Klien, *For Laguna Beach's Mayor, A Private Grief Goes Public*, Los Angeles Times, Feb. 1, 1989, Part V, at 1, col. 1.

The City Council of Wellington, New Zealand voted unanimously to extend all benefits to the domestic partners of lesbian and gay bus drivers thus becoming the first city in New Zealand to do so. *LESBIAN CONNECTION*, Sept./Oct. 1988, at 7.

9. The "right" to visit one's family members in the hospital and to authorize their medical treatment if they are unable to do so is perhaps the most emotionally charged of all the benefits that traditional families receive and alternative families seek. When people are in the hospital or are unconscious and unable to make treatment choices themselves, the individuals closest to them are even more important than ever for providing support and caring.

Most hospitals allow immediate family members unquestioned access to a hospitalized person. Because this visitation is almost universally granted, most traditional fam-

memberships from organizations.<sup>10</sup> Thus, the legal system regulates individuals' choices in defining their family in an attempt by society to ensure the continued formation of traditional nuclear families and to exact a price of lost protection and lost benefits from those who live outside this norm.

Despite the impact that the definition of family has on those who do not fit that definition, virtually no one, regardless of whether they support the traditional nuclear family as the only acceptable form of intimate relationship or whether they present a critique of the legal system's control of family, even challenges the accepted definition of family as Ward, June, Wally and the Beaver, plus or minus a few blood relatives. With the exception of two heterosexuals "cohabitating," no one addresses the question of whether people can choose who our families are, except for marriage, and what families based on choice, and protected by society, would look like.

But family is beginning to attain other definitions that are alternative to this traditional one. One definition of an alternative family comes from the Alternative Family Rights Task Force created by the Madison, Wisconsin Equal Opportunities Commission. Under that definition, an alternative family is:

Two or more adults, not related by blood, marriage, or adoption, who are involved in a mutually supportive, committed relationship and who are voluntarily registered publicly in order to be considered, under municipal ordinance, as a family, together with their depen-

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ily members are not even "aware" that they are receiving a benefit that is denied to some other people.

Alternative families are denied this right to visit their family members and to authorize their medical treatment. See Cox, *supra* note 5, at 46-50 for a fuller discussion of these problems encountered by alternative family members. See also AFTER YOU'RE OUT 148 (K. Jay & A. Young eds. 1975) (story of one lesbian who visited her partner in the hospital by telling the nurses that she was her partner's sister) and K. THOMPSON & J. ANDRZEJEWSKI, WHY CAN'T SHARON KOWALSKI COME HOME? (1988) (book explaining problems encountered by lesbian when her partner became severely disabled and she was denied visitation rights by her partner's father).

10. Public accommodations also grant benefits to traditional nuclear families which are not given to alternative families. Most of these benefits relate to reduced-price memberships for families. These memberships have a "family" price for two adults and their children that is less expensive than the rate would be for each family member to purchase an individual membership. These memberships tend to be in effect at YMCAs and YWCAs; health or recreational clubs; political, environmental or "issue-oriented" groups; as well as at parks, amusement centers and art centers.

Some of these public accommodations are recognizing the prevalence of alternative families in society today and have changed their membership policies accordingly. For example, several have switched from family memberships to household memberships in recognition of the fact that a large segment of the population is organized in household or alternative family groups. This change is a positive recognition of alternative families and has enabled them to obtain similar benefits to traditional families. See Cox, *supra* note 5, at 50-51 for a fuller discussion of this issue.

dent children.<sup>11</sup>

In this Article, this definition will be used when referring to alternative families. Thus, this definition includes unmarried heterosexual couples, gay and lesbian couples, and groups of adults and children who have formed extended families of choice.<sup>12</sup>

The Madison Equal Opportunities Commission (M.E.O.C.) established the Alternative Family Rights Task Force (task force) to study the desirability and feasibility of enacting an ordinance that would grant traditional family benefits to alternative families in the areas of employment-related benefits, single-family housing, family memberships in organizations, authorization of emergency medical treatment and hospital visitation. The Madison ordinance, which was drafted by the City Attorney for introduction to the Madison Common Council, would have required all employers, organizations and medical facilities within the city's boundaries to extend these benefits to alternative families. Alternative families would have registered with the City Clerk to become eligible for benefits. This author was co-chair of the task force during its almost two year existence and was a Commissioner on the Equal Opportunities Commission through most of its discussion of the alternative family rights ordinance. After extensive study and discussion, the Madison Common Council rejected this broad ordinance. Instead, it amended the local zoning ordinance to include alternative nuclear families, and it extended sick and bereavement leave to City employees living in alternative families.

Other cities have adopted legislation granting city employees the right to obtain employment benefits for their domestic partners, including Berkeley, West Hollywood, and Santa Cruz, California, as has the School District of Berkeley, California.<sup>13</sup> The San Francisco Board of Supervisors passed domestic partners' legislation twice which would have registered domestic partners for benefits, including hospital and jail visitation. Mayor Diane Feinstein vetoed the legislation both times.<sup>14</sup> The legislation is being rewritten with plans of reintroduction

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11. THE REPORT OF THE MADISON EQUAL OPPORTUNITIES COMMISSION ALTERNATIVE FAMILY RIGHTS TASK FORCE, April 11, 1985 at 1 of the Introduction [hereinafter cited as TASK FORCE REPORT].

12. The Madison Equal Opportunities Commission later altered the definition of an alternative family to include only "two adults . . . plus dependents" thus making its definition of alternative family equivalent to the traditional nuclear family. A more thorough discussion of how the courts can determine which groups comprise extended alternative families was discussed by the California Supreme Court in *City of Santa Barbara v. Adamson*, 27 Cal.3d 123, 133-134, 164 Cal. Rptr. 539, 545, 610 P.2d 436, 442 (Cal. 1980).

13. See *supra* note 8. For a further discussion of domestic partnership laws, see H. DURRY & D. CLIFFORD, A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES 61-64 (1985).

14. See *supra* note 8.

now that Feinstein is no longer mayor. A Minneapolis, Minnesota, ordinance would have extended benefits to alternative families on a city-wide basis, similar to the Madison ordinance.<sup>15</sup> That ordinance was never reported out of City Council committee, but one of its supporters is considering reintroduction.<sup>16</sup> East Lansing, Michigan, is considering a zoning ordinance that would expand its "family" definition to include functional families defined as a group of persons whose relationship is of permanent and distinct domestic character.<sup>17</sup>

In discussing the legal system's response to alternative families seeking an extension of traditional family benefits, this paper is divided into two main sections. The first section summarizes the Madison experience in trying to pass a comprehensive alternative family rights ordinance. It takes an in-depth look at the entire process from the grass-roots pressures on the M.E.O.C. which resulted in formation of the task force to the Common Council's enactment of two minor sections of the proposed ordinance. It will analyze the political and legal process used in an effort to obtain significant reform in the definition of family within Madison. It will note that over six years of work was expended by numerous activists, extensive grass-roots organizing was done to generate broad community support for the proposed ordinance, and thus far the legislative process has only yielded two minor amendments to the local statutes.

The second section examines the limited progress that has been made from working within the system to obtain an extension of benefits and protection to all family members and raises the dilemma currently facing activists working in this area. Because of our social and educational training, activists turn to the legal system with the belief that, by going to it and challenging the inequities in society—in this case, the discrimination against alternative families—we will be able, through legislation or litigation, to obtain the recognition, benefits, and protection given to the traditional family. Because of our feminist perspective and the lessons we have learned from seeing how patriarchal society<sup>18</sup>

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15. TASK FORCE REPORT, *supra* note 11, at Section G, at 2-5.

16. Conversation with Bill Prock, Enforcement Manager of Minneapolis Civil Rights Office, February 17, 1989.

17. See TASK FORCE REPORT, *supra* note 11, at Section G, at 36. It is important to note that the definition of functional family referred to a "group of persons *other than a family*." (emphasis added). While this may have been done simply to distinguish functional families from individuals meeting the ordinance's definition of family, it can also be read to indicate a continuing view that alternative or functional families are not "real" families. For a further discussion of this issue, see notes 123-24 and accompanying text, *infra*.

18. The narrow definition of patriarchy is a system where the male head of the household had complete legal and economic power over his dependents. G. LERNER, *THE CREATION OF PATRIARCHY* 238-239 (1986). In its wider definition, and the one that is used in this paper, patriarchy is "the manifestation and institutionalization of male dominance over women and children in the family and the extension of male



deals with problems of inequity, however, we turn away from the legal system with an understanding that it is a system of rules and regulations designed to perpetuate the power of the patriarchy over women's lives.<sup>19</sup> As Audre Lorde so eloquently explained, "[T]he master's tools will never dismantle the master's house. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change."<sup>20</sup>

In the case of women's choices of intimate relationships, patriarchal society uses the "master's tools" of social pressure and privileging only the traditional nuclear family with benefits to ensure that conformity in family composition will be maintained. Use of the legal system to end this enforced conformity may bring about slow, incremental change but will not completely loosen these bonds that have been placed on individual expression and choice.

Activists interested in loosening these bonds inflicted by a patriarchal society are thus faced with the dilemma of wanting to use the legal system to remedy injustice while knowing that genuine change which recognizes the incredible breadth of women's choices of intimate relationships will not result from working within the legal system. Some progress has been made within the system toward recognizing unmarried couples (whether gay, lesbian or heterosexual) as legitimate families. But virtually no progress has been made for extended alternative families connected by choice, not blood. Not surprisingly, as section two details, this lack of progress has impacted on poor and working-class people, people of color, and gay men and lesbians who tend to form extended alternative families.

The risk that arises from achieving incremental results within the system is the temptation to accept those results as sufficient. The challenge for activists is to remain dissatisfied with and critical of the system. It means consciously deciding to work within the system to achieve what is achievable within it, while retaining the energy and vision to push the struggle into the streets. People, individually and to-

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dominance over women in society in general. It implies that men hold power in all the important institutions of society and that women are deprived of access to such power." *Id.* at 239.

19. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1279-1280 n.3. See also Menkel-Meadow, *The Feminist Legal Theory, Critical Legal Studies and Legal Education or The Fem-Crits go to Law School*, 38 J. LEGAL ED. 61 (1988); Wishik, *To Question Everything: The Inquires of Feminist Jurisprudence*, 1 BERK. WOMEN'S L. J. 64 (1985); Rifkin, *Toward a Theory of Law and Patriarchy*, 3 HARV. WOMEN'S L.J. 83 (1980); Polan, *Toward a Theory of Law and Patriarchy in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (D. Kairys ed. 1982). These authors establish that, in numerous areas, the legal system maintains the patriarchy's power, rather than diminishes it. These areas include challenges to laws restricting women's employment opportunities, affirmative action, the right to vote, and the ability to obtain contraceptives and abortions.

20. A. LORDE, *SISTER OUTSIDER* 112 (1984).

gether, must continue in our day-to-day lives to ask for recognition and benefits for our families at work, in our homes and in the streets. This means consciousness-raising with our friends and family of origin about our family of choice, speaking of our partners and children as family, agitating at work to receive corresponding benefits and protection, and organizing throughout our communities to bring forth acceptance of all definitions of family and to attain the recognition that our families deserve. For in the end, recognizing alternative families means allowing people freedom of individual expression and choice without extracting a significant price for that expression.

This Article discusses alternative family rights from a feminist context which attempts to include the perspectives of women of different races, classes, and sexual preferences. These perspectives are necessary to any meaningful critique of the accepted family definition because lesbians, poor and working class women, and women of color form families outside the traditional definition more often than do heterosexual, white, middle-class women.

Additionally, this Article focuses on the perspective of women because women are most heavily impacted by the restrictions placed on family choice. Even with the move away from the "separate spheres" ideology of the nineteenth century where a woman's identity was based on her role in the family,<sup>21</sup> society continues to connect women more closely than men to their families for identity, status, and economic benefits. This connection impacts on women more heavily than on men because the patriarchal tradition of family places the man at the head of the family and the woman and children as his subordinates.<sup>22</sup> So when women's identity is connected with the home, that identity is frequently one of subordination. Looking at how law affects and regulates intimacy and women's choices of intimate partners means looking at how law affects a significant and substantial portion of many women's lives.

However, many of these restrictions also impact men's lives as well, especially men oppressed by patriarchal power, such as gay or working-class men and men of color. While the impact of patriarchal power on these men is less because of the "male privilege" afforded them, their relationships are also outside the accepted norm and are also harmed by these restrictions. The reader is encouraged to remain aware throughout this article of the impact on these men and to retain a view of whether the questions asked or solutions posed will equally resolve the problems for them as well.

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21. Minow, *supra* note 2, at 866. See also Finley, *Transcending Equality Theory: A Way Out of the Maternity and The Workplace Debate*, 86 *COL. L. REV.* 1118, 1118-1120 (1986)(discussing ideology in society and legal system that separate spheres still exist for men and women).

22. Minow, *supra* note 2.

## I. THE MADISON EXPERIENCE

On April 25, 1983, the Madison Institute for Social Legislation (MISL)<sup>23</sup> sent a letter to the M.E.O.C. requesting that the Commission set up a task force to study the feasibility of introducing a "domestic partners" bill to the Madison Common Council.<sup>24</sup> According to MISL's letter, domestic partners legislation would lead to fuller protection of rights guaranteed under the local equal opportunities ordinance<sup>25</sup> by recognizing diverse relationships between all individuals.<sup>26</sup> MISL also volunteered to have some of its members serve on the task force.<sup>27</sup>

In response to MISL's proposal, the M.E.O.C. established an ad hoc committee (hereinafter referred to as the task force) to study the broad range of issues involved in alternative family rights legislation.<sup>28</sup> These duties included studying the issues involved in the legislation by soliciting information from other cities where such legislation had been considered, from businesses and corporations where benefits had been extended, and from local organizations and individuals interested in the concept.<sup>29</sup> Additionally, the task force would provide information and outreach; secure testimony from individuals and organizations through M.E.O.C.-sponsored forums; investigate issues surrounding the ordinance with City officials and agencies; prepare a detailed, well documented recommendation to the M.E.O.C. on the desirability and feasibility of implementing an alternative family rights ordinance; and provide testimony and documentation to the Common Council.<sup>30</sup>

Numerous individuals and organizations were asked to join the task force. The goal for membership was to include those individuals and organizations who were supportive of alternative family rights, would be affected by such legislation, or may oppose such legislation. Attempts were made to include individuals of all ages, sexes, sexual preferences, races, and classes. Some of the organizations invited to send representatives included the Office of the State Insurance Commissioner, Lives Unlimited (a therapy collective), MISL (the original

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23. MISL defined itself as a broad-based coalition of Madison residents representing a variety of community interests. See TASK FORCE REPORT, *supra* note 11, at Section A, at 1-2.

24. *Id.* at 1. It is important to note that MISL envisioned a domestic partners' ordinance which would extend benefits only to lesbian, gay and unmarried heterosexual couples.

25. Madison General Ordinance § 3.23.

26. See *supra* note 24. However, the MISL proposal would not have extended benefits to all individuals because it did not include extended alternative families.

27. *Id.* at 2.

28. See TASK FORCE REPORT, *supra* note 11, at Section B, at 1.

29. *Id.* These duties and goals were stated in a memo to the M.E.O.C. from this author who served as convener and co-chair of the task force.

30. *Id.* at Section B, at 1-2.

proposer), Blue Cross and Blue Shield of Wisconsin, Madison General Hospital, Group Health Collective (a local health maintenance organization), Madison Federation of Labor (AFL-CIO local affiliate), Y.M.C.A., Access to Independence (an organization supporting rights for elderly and handicapped individuals), Greater Madison Chamber of Commerce, Greater Madison Board of Realtors, Madison Apartment Association, The UNITED (a local organization supporting gay and lesbian rights), Dane County S.O.S. Senior Council, and the local chapter of the National Organization for Women.<sup>31</sup> Additionally, several individuals of different races, classes, sexual orientations and ages were asked to participate. No one interested in membership was turned away. The task force ultimately consisted of seventeen individuals, several of whom were representing organizations.<sup>32</sup>

The task force met, as a whole, from September 28, 1983 through February 21, 1985.<sup>33</sup> Much of this time was devoted to gathering information and resolving issues such as the definition of alternative family and the extent of coverage for the proposed legislation. The task force began wrestling with the definition of alternative family at its November 17, 1983 meeting.<sup>34</sup> In its January 19, 1984 meeting, it adopted the following working definition: "Two or more unmarried, legally adult persons involved in a mutually supportive, committed relationship who are registered publicly as 'domestic partners' in order to be considered, under municipal ordinance, as a family."<sup>35</sup>

Over the course of the next several meetings, the task force heard testimony from organization representatives and individuals. The testimony included such topics as concerns raised by individuals and health-care providers on hospital visitation and treatment authorization;<sup>36</sup> by individuals and the Y.M.C.A. on membership policies;<sup>37</sup> by a neighborhood association, the Madison Board of Realtors, a university professor of Real Estate and Urban and Regional Planning, an attorney, and a MISL representative on zoning definitions;<sup>38</sup> by individuals on the impact of an expanded family definition on children living in alternative families;<sup>39</sup> by the MISL labor project, union representatives, city employees, employers and a health insurance representative on personnel policies and insurance;<sup>40</sup> and by several individuals opposing the ordi-

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31. *Id.* at Section D, at 1-2.

32. *Id.* at Section C, at 1.

33. *Id.* at Section E, Index to Minutes, at 1-2.

34. *Id.* at Section E, Minutes of November 17, 1983, at 2.

35. *Id.* at Section E, Minutes of January 19, 1984, at 1.

36. *Id.* at Section E, Minutes of November 17, 1983, at 1; *id.* at Section E, Minutes of January 19, 1984, at 1-2.

37. *Id.* at Section E, Minutes of February 23, 1984, at 4-5.

38. *Id.* at 1-4.

39. *Id.* at Section E, Minutes of March 15, 1984, at 1-2.

40. *Id.* at Section E, Minutes of May 17, 1984, at 1-3; *id.* at Section E, Minutes

nance on religious grounds.<sup>41</sup>

Additionally, on September 20, 1984, the task force sponsored a public forum on alternative family rights.<sup>42</sup> It had the largest attendance of any M.E.O.C.-sponsored forum in its twenty-year history. Over 126 individuals and organization representatives appeared in support of the ordinance and sixteen more sent written statements in support; thirty-seven individuals and organization representatives appeared in opposition to the ordinance and thirteen more sent written statements in opposition.<sup>43</sup>

Over the course of the task force's existence, it determined that a significant problem existed concerning benefits denied to alternative families and granted to traditional nuclear families. It also discovered that a vast array of alternative families were in existence and that they encountered a wide range of problems and unequal treatment as compared to traditional nuclear families.

While definitions, statistics and documentary evidence are useful means to establish the variety and prevalence of alternative families,<sup>44</sup> I have chosen to have women from various races, classes and sexual pref-

of June 21, 1984, at 1-5.

41. *Id.* at Section E, Minutes of October 18, 1984, at 1-2. *See Cox, supra* note 5, at 30-31 n.131 for a sampling of the type of objections raised.

42. *Id.* at Section J, at 1.

43. *Id.* at Section J, at 64-79.

44. The M.E.O.C.'s report to the Common Council reiterated some of the statistical findings concerning alternative families:

- In 1983, only twenty-nine percent of American households consisted of the traditional nuclear family (a married couple with dependent children);
- More than eight million unmarried couples or one of every twenty-five Americans would benefit from an alternative families ordinance;
- Since 1970, the number of unmarried couples has grown two hundred and sixty percent and between 1970 and 1983, unmarried couples under forty-five have increased by nine hundred and thirty percent;
- An estimated thirty percent of Madison area school children live in alternative families;
- Unmarried heterosexual couples are more likely to be black and have blue-collar jobs; and
- Unmarried couples tend to be poorer than their married counterparts which can, in part, be explained by discrimination.

REPORT OF THE EQUAL OPPORTUNITIES COMMISSION ON THE PROPOSED ALTERNATIVE FAMILY RIGHTS ORDINANCE, October 21, 1987, at 1-2 (hereinafter REPORT OF THE EQUAL OPPORTUNITY COMMISSION). For similar figures on the increase in unmarried couples, see Comment, *Loss of Consortium: Adoption of a Common Law Cause of Action to a Modern Day Reality*, 54 U.K.M.C. L. REV. 512, 135 (1986); Cox, *supra* note 5, at 3 n.6-n.7. Additionally, there are an estimated twenty million lesbians and gay men living in the U.S. *See H. DURRY & D. CLIFFORD, supra* note 13, at ix. The prevalence of lesbian and gay families is so prevalent that, even in 1975, the American Civil Liberties Union included a chapter on The Gay Family in its handbook, THE RIGHTS OF GAY PEOPLE: THE BASIC ACLU GUIDE TO A GAY PERSON'S RIGHTS 103-135 (1975).

erences "speak" about how they define "family." This type of personal experience has often been left out of traditional academic articles which has caused an absence and dehumanizing of women's voices.<sup>45</sup> Using these women's stories to show the breadth of alternative families in existence allows me to remain true to the feminist method of consciousness-raising, "collective critical reconstruction of the meaning of women's social experience, as women live through it."<sup>46</sup>

Additionally, I present their experiences to show how society and the legal system, by refusing to acknowledge these families—to legitimate, protect and provide benefits to them—have inflicted harm on these women and their family members. This section presents stories gathered during the past six years that I worked with the M.E.O.C. and the Madison Institute for Social Legislation to enact an alternative family rights ordinance that would protect and benefit alternative families or discovered while researching this article. These are but a few of the stories of the numerous individuals who came forward to explain how the restricted definition of family has impacted on them and their alternative families.<sup>47</sup>

a. Cheri and Janet live together in a committed relationship and would like that commitment recognized by society.<sup>48</sup> They have four children, three of whom were from Janet's previous marriage and one that they had together through artificial insemination. Cheri loves all their children "just as much as any heterosexual couple . . . loves their children. However, my life is very, very difficult for a number of reasons which also affect my children. The baseline part of it is not difficult because I live in a very loving family, very loving household so that makes that part of my life very nice and very pleasant."<sup>49</sup>

However, when Janet became unemployed, it meant that they had to support a family of six on \$10,000. Even though Cheri had access to family health insurance through her employer, she could not provide health insurance to her family because her employer restricted coverage to traditional families. As a result, an extra \$200 a month had to be used to pay for family health insurance which, if she had been part of a traditional family, would have been provided by her employer. Additionally, because Janet bore their last child, Cheri has no legal rights to him, even though she has primary responsibility for his care within

45. Littleton, *In Search of a Feminist Jurisprudence*, 10 HARV. WOMEN'S L.J. 1, 4 n.15 (1987).

46. Wishik, *supra* note 19, at 69.

47. For a fuller understanding of the extent of the problem, see TASK FORCE REPORT, *supra* note 11, at Sections E and J (task force minutes and public forum transcript); Cox, *supra* note 5, especially at 46-50 which details problems encountered by alternative families in hospital visitation and treatment authorization.

48. Testimony of Cheri Maples, TASK FORCE REPORT, *supra* note 11, at Section J, at 16-18.

49. *Id.* at 17.

their family. She has no legal right to authorize medical care for him. She has no legal right of access to his health records or school records.

Cheri wants to be a part of all her children's school activities, but is afraid of what it may mean for them to have her with them when they register for school.<sup>50</sup> She is afraid that they will be harassed or stigmatized because they come from an alternative family not recognized by society or by law. For now, she believes that her children are growing up without a lot of the things they should be entitled to financially, emotionally, and legally. She is not asking for anything to be taken away from anybody; she is only asking for the option to be included.

b. According to the Wisconsin Association of Single Adoptive Parents, many single individuals are deciding to skip marriage and start their families by adopting children.<sup>51</sup> These individuals want the rewards and fulfillment of raising children and are unwilling to forego the experience even though they will be single parents. According to Mary Cissoko who heads the Association and started her family by adopting Amy Christine a few years ago: "There are lots of family situations today that couldn't be called traditional . . . . People either understand and empathize or they don't understand no matter how much you try and explain it. A family is a family regardless of makeup. A family is something you create."<sup>52</sup>

c. Ellen spoke about living in a seven-year-long relationship with her male partner and his two children from a previous marriage.<sup>53</sup> They have chosen not to marry for personal reasons. When her partner became unemployed and was unable to provide health insurance for himself and his two children, she would have liked to be able to provide insurance coverage for her family, a benefit granted to her co-workers in traditional families. However, she was unable to provide this insurance for her family because her definition of family did not coincide with her employer's definition of family. Thus, she was denied employment benefits equal to those received by her co-workers and had the additional burden of having to pay for family health insurance out-of-pocket.

d. Janice and Crystal are living as a family with Crystal's two

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50. Some school systems have begun to recognize alternative families and do allow adult alternative family members to register their children for school and pick-up the children after school. However, alternative family members are unsure about when their relationship will be recognized and thus have to face the problems that may arise from intermittent recognition. See TASK FORCE REPORT, *supra* note 11, at Section E, Minutes of March 15, 1984 at 2.

51. Kelley, *Singles and Adoption*, Milwaukee Sentinel, Mar. 27, 1987, at 2, col. 1.

52. *Id.*

53. Testimony of Ellen Magee, TASK FORCE REPORT, *supra* note 11, at Section E, Minutes of May, 17, 1984, at 2.

daughters. Janice is a non-biological mother and co-parent for Crystal's two daughters.<sup>54</sup> Janice and Crystal have the children in their home every other week under a joint custody arrangement with the children's father. Janice is completely involved in feeding, caring for, and raising the girls, from preparing meals, taking them to school, bathing them, reading bedtime stories, instilling responsibility in the girls to care for themselves, and encouraging the girls to share their lives with her. She has both physical and emotional responsibility for the girls and is treated within the family as a co-parent.

According to Crystal, the girls' biological mother, she and Janice want their family to be legally and socially recognized because Janice has the same role in the girls' lives as does any other parent. In fact, her youngest daughter told Crystal that when she grew up, she did not want to be a mom. She wanted to be a co-mom. The children completely accept Janice as a part of their family and the children feel very open about Janice's role as a co-parent.

However, outside the family, Janice's role in the girls' lives and her responsibility for them is not recognized. Because of society's refusal to recognize her role in the family, Janice and Crystal's family has encountered significant harm. These harms include Janice's employer's refusal to allow her to use her sick leave to care for the girls when they are sick even though sick leave is given to her co-workers who are biological parents or stepparents to care for their children. If Crystal did not receive employer-based insurance which covered the girls, Janice would want to be able to provide insurance for her family through her employer's plan but would be unable to do so. If Crystal were ill or unable to care for the girls, Janice would want to be able to take over the girls' care, but would be prevented from doing so. The girls' biological father would be given complete authority over them.

Crystal and Janice believe that it is also a significant problem for the children to not have their family recognized and legitimated by society. Public recognition of their family by society and under the law as an alternative family would be emotionally and psychologically positive for the children, as well as for their parents. It is important for all members of this family to be "on record" as a legitimate family.<sup>55</sup>

e. Two Hispanic women, Andrea-Teresa Arenes and Eluisa Gomez, testified about the prevalence in many minority cultures of having close ties with nonfamily members and giving them family status and titles of respect.<sup>56</sup> They also spoke about the denial of this fam-

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54. Testimony of Janice Czynson and Crystal Hyslop, TASK FORCE REPORT, *supra* note 11, at Section E, Minutes of March 15, 1984, at 1.

55. *Id.*

56. Minutes of the Madison Equal Opportunities Commission, February 27, 1986. See also Aschenbrenner, *Extended Families Among Black Americans*, 4 J. COMP. FAM. STUDIES 257, 266-268 (Autumn 1973). Aschenbrenner discusses how ex-



ily status by white society and of struggling to maintain their extended family relationships in the face of pressure to fit the norm of the white nuclear family. Although they did not refer to any specific difficulties they had encountered, they testified before the M.E.O.C. because they thought that an alternative family rights ordinance would have a significant positive impact for many people of color and needed to include protection for extended alternative families.

f. Lilah, Helen and Myrle (all over sixty) live together in one of their church's group homes for the elderly.<sup>57</sup> Besides being less expensive than a retirement home, the group home provides nicer accommodations and better company for its residents. The women furnished the house themselves, perform light chores throughout the house, and make joint decisions in areas that affect the household. They noted that it took some adjustments getting used to group living but say that after six months, they've "melted into a family."<sup>58</sup> The women are required to be able to get around on their own and not need special care to live in the home. They find that for elderly people who want to be independent but cannot afford it, this living arrangement is a good alternative.

g. Martha and Alix are two women who live together, love together, and are raising a family together.<sup>59</sup> They are living as a family despite the pressures and punishments that society places on them for defining their family in a way that is outside the conformity required by society and law. They and their two children have been living together for over seven years.

When Alix tried to purchase a YMCA family membership for Martha as a birthday present, the YMCA refused to sell one to her because Alix's definition of family (an intimate relationship based on trust, commitment and mutual support) did not match the YMCA's definition of family (a married couple plus dependents as defined by the

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tended kin relationships among unrelated Blacks established matrices within which they found "their identity and purpose for living and striving." *Id.* at 267. Additionally, Herbert G. Gutman discusses the widespread practice of black families investing non-kin relationships with symbolic kin meanings and functions. H. GUTMAN, *THE BLACK FAMILY IN SLAVERY AND FREEDOM 1750-1925*, at 217 (1976). This practice existed during slavery as a method that bound children to fictive kin in case sale or death separated them from their parents and blood relatives. *Id.* at 219. "Fictive" kin also played roles in slave communities by binding unrelated adults to one another with corresponding obligations. *Id.* at 220.

57. Smith, *Sharing A Roof, Sharing Their Lives*, San Diego Tribune, April 13, 1988, at C-4, col. 3, 6.

58. *Id.* This group home in Vista, California is legal because the California Supreme Court has determined that restrictions in zoning ordinances cannot impinge on individuals rights. *See City of Santa Barbara v. Adamson*, 27 Cal.3d 123, 164 Cal.Rptr. 539, 610 P.2d 436 (Cal. 1980). But in many states, restrictive zoning definitions in single-family neighborhoods would prohibit this type of living arrangement.

59. Egerton, *For 2 Women, This Holiday is Romantic One*, Capital Times [Madison, WI] February 14, 1986, at 6, col. 1.

I.R.S.).<sup>60</sup> After deciding that they were tired of society's negation and the punishment of their family, they fought the YMCA's refusal to recognize their family. They pursued their case under the Madison Equal Opportunity ordinance<sup>61</sup> and lost at both the hearing examiner level and on appeal.<sup>62</sup>

A few years later, on Valentine's Day, a local newspaper ran an article about Alix and Martha's relationship with each other and the family they are raising together, with references made to their joint incomes, jointly owned home, that they still cannot exercise as a family together at the YMCA and that they must buy separate health insurance protection for Alix and for Martha and her biological children.<sup>63</sup> These women have not allowed society's or the legal system's refusal to recognize their family to keep them from living as a family and living their intimate lives in the way they choose. But they are being forced to pay a price: clearly financially and as clearly emotionally for freely expressing their intimate associational choice. They continue to make that choice but they also continue to pay for their choice. The legal system—society's rules and regulations—denies protection to or recognition of their family, a contrast all the more noticeable because the traditional family is given significant status, benefits and protection in this society.

As all these stories indicate, the variety in family composition is limited only by the number of people with whom one speaks. The challenge that follows for society and the legal system is whether this variety in family composition can be acknowledged so as to grant equal recognition, protection and benefits to all families regardless of their composition. It is to resolving this challenge that the task force turned.

Obtaining recognition of all alternative families was an issue that plagued the task force from its inception. By its March 15, 1984, meeting, the task force was struggling with whether eligibility for alternative family status should be restricted to unrelated adults and whether family size should be restricted to two adults.<sup>64</sup>

Virtually its entire April 19, 1984, meeting was spent discussing the scope of the alternative family definition.<sup>65</sup> The task force discussed the problem of restricting eligibility to unrelated adults which would exclude adult brothers and sisters wanting to provide insurance coverage for one another and married couples wanting to live together as part of a larger group.<sup>66</sup> The task force tried to resolve conflicting con-

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60. Madison Equal Opportunities Commission Case No. 3110, Oct. 10, 1985.

61. Madison General Ordinance 3.23(1).

62. See Cox, *supra* note 5, at 50-51, for a discussion of their case.

63. Egerton, *supra* note 59.

64. See TASK FORCE REPORT, *supra* note 11, at Section E, Minutes of March 15, 1984, at 3.

65. *Id.* at Section E, Minutes of April 19, 1984.

66. *Id.* at 1. See also note 142, *infra*.

cerns including wanting to err, if at all, on the side of including rather than excluding individuals while being aware that if we made the definition too broad, we may be dooming it to failure politically.<sup>67</sup>

We acknowledged that defining alternative family as "two or more adults" may lead to greater opposition from homeowners and neighborhood associations in single-family neighborhoods and that the likelihood of more than two persons being committed in the sense we were discussing was probably limited.<sup>68</sup> One member stated the dilemma quite succinctly when he urged us to consider our objectives. "Do we want to recommend the optimum in what we believe needs to be extended as rights, or do we want to suggest what we believe is most passable?"<sup>69</sup> Ultimately we settled on "two or more adults" wanting to provide dignity and a name for all individuals living in alternative families and not perpetuate injustice by excluding extended alternative families from the definition. We did realize, however, that later in the process it may become necessary to compromise on the definition in order to obtain passage of the ordinance.<sup>70</sup>

One problem repeatedly encountered by the task force was in obtaining testimony from businesses. While testimony was received from some businesses,<sup>71</sup> repeated concern was expressed on obtaining additional testimony from businesses and insurance companies.<sup>72</sup> Task force members were aware that businesses and insurance companies would be impacted by the changes required under the proposed ordinance and wanted to obtain as much information as possible on their concerns so that viable options could be developed. Attempts were made to contact the local Chamber of Commerce,<sup>73</sup> a survey was developed and sent to local businesses asking for information on extension of sick leave, bereavement leave and health insurance benefits to alternative family members<sup>74</sup> and a meeting was held with the Wisconsin Commissioner of Insurance.<sup>75</sup>

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67. *Id.*

68. *Id.* at 3.

69. *Id.*

70. *Id.*

71. *Id.* at Section E, Minutes of February 23, 1984, at 4-5; *id.* at Section E, Minutes of June 21, 1984, at 1-5.

72. *Id.* at Section E, Minutes of October 18, 1984, at 3.

73. *Id.*

74. *Id.* at Section K. Surveys were sent to twenty-one local businesses and fourteen responses were received. Employer size ranged from firms with 0-250 employees to firms with over 1000 employees. Most employers indicated that they limited sick leave and bereavement leave to nuclear or extended family members, some did not offer sick leave for family members' illnesses, and some included individuals outside the nuclear or extended family at the supervisor's discretion. *Id.* at 1. All of the employers provided some form of group health insurance benefits to their employees and most excluded roommates or unmarried partners from the coverage. *Id.* at 2.

75. *Id.* at Section M. At the meeting, one member of the Commissioner's office

Additionally, the task force surveyed 2,204 city employees concerning alternative family rights and obtained responses from 568 employees or twenty-six percent.<sup>76</sup> Fifty-nine individuals or ten percent of the respondents (which was two and seven-tenths percent of the workforce) indicated that they considered themselves members of alternative families.<sup>77</sup> According to the survey results, sixty-six percent of them indicated that they would apply for health insurance benefits, ten percent would not apply, and twenty-four percent were uncertain whether they would apply.<sup>78</sup> The survey indicated that the cost of providing health insurance benefits to the alternative families of city employees would be, at the most, an increase of three and eight-tenths percent on a 1986 health insurance budget of \$3,759,000.<sup>79</sup>

On April 11, 1985, the task force presented its recommendations and report to the M.E.O.C. These recommendations indicated that the task force had found evidence of discrimination in the City of Madison on the basis of alternative family status which caused psychological, social and economic harm to alternative family members and undermined local antidiscrimination legislation.<sup>80</sup> The task force determined that it was both desirable and feasible to enact an alternative family rights ordinance.<sup>81</sup> The task force retained its definition of alternative

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stated that the impact of an ordinance extending health insurance benefits to alternative families or insurance companies would not be significant because two employed individuals would probably retain their individual coverage rather than obtain a family policy due to cost, and public registration would limit the number of people applying for benefits. *Id.* at 2. He thought the insurance companies may resist providing coverage, especially due to concerns about AIDS or other "lifestyle" factors, but thought they would not discontinue service to their customers as a result of being required to extend coverage to alternative families. *Id.*

76. Results of Survey of City Employees Concerning Alternative Family Rights, May 12, 1986. See Cox, *supra* note 5, at 28 n.120.

77. *Id.*

78. *Id.*

79. *Id.* This amount was calculated on the assumption that 10% of the work force would apply for benefits, a number that was considered to be a high estimate. If it is assumed that all city employees who are in an alternative family did respond to the survey and that only the ones who indicated they would seek family benefits did, in fact, seek these benefits, then the cost to the City would be \$42,000.00 or 1.1% increase in the 1986 health insurance budget. REPORT OF THE EQUAL OPPORTUNITIES COMMISSION, *supra* note 44, at 6. While this type of survey does not verify the cost to employers, it can be seen from the survey that increased costs would not be significant. Thus, most employers would not encounter staggering cost increases from equalizing benefits between traditional families and alternative families. It would be disingenuous for an employer like the City of Madison to resist paying from \$42,000 to \$122,000 for alternative families' health insurance benefits when it is willing to pay almost four million dollars annually to provide the same benefits to its employees and their traditional families. Analyzed in this fashion, it becomes clear that cost considerations are simply an excuse that some employers may use to justify their refusal to extend these benefits.

80. See TASK FORCE REPORT, *supra* note 11, at Introduction, at 1.

81. *Id.* at 4.

family as including two or more adults, together with their dependent children.<sup>82</sup> The task force also recommended that costs of registration with the City should be covered by a registration fee, that all rights, benefits, and opportunities given to families based on blood, marriage or adoption should be extended to alternative families, and that alternative family status should be added to the anti-discrimination ordinance as a protected class to prevent discrimination based on forming, registering or maintaining an alternative family.<sup>83</sup>

From May, 1985, until November 3, 1987, when the M.E.O.C. presented its report to the Common Council on the proposed alternative family rights ordinance, the M.E.O.C. took on the responsibility of deciding whether to propose the ordinance and what its scope should include.

The M.E.O.C. chose to narrow the definition of alternative family in response to concerns raised by the Greater Board of Realtors, the Madison Apartment Association, alderpersons and neighborhood associations.<sup>84</sup> They all objected to the definition of "two or more adults" because it could potentially allow groups of college students to register as an alternative family in order to live in restrictively zoned neighborhoods.<sup>85</sup> The M.E.O.C. also added a requirement that alternative families live together in a single housekeeping unit in a dwelling unit in order to prevent abuse.<sup>86</sup> Thus, the definition of alternative family presented to the Common Council was: "Two adults unrelated by marriage, blood, or adoption and their dependents living together as a single housekeeping unit in a dwelling unit."<sup>87</sup>

In order to receive protection from discrimination, alternative families would be required to register publicly with the City Clerk's office.<sup>88</sup> When registering as an alternative family, the adults would be required to sign an affidavit indicating that they meet the conditions contained in the ordinance.<sup>89</sup> It was believed that by requiring an affidavit of eligibility, those individuals who may fraudulently register would be liable for perjury charges.<sup>90</sup> Additionally, the proposed ordinance granted any employer or company that suffered a loss due to a

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82. *Id.* at 1.

83. *Id.*

84. REPORT OF THE EQUAL OPPORTUNITIES COMMISSION, *supra* note 44, at 3.

85. *Id.* It should be noted that the Madison Zoning Ordinance does not restrict traditional families to two adults and their dependents. Instead, it defines family, in that case, to be two or more persons related by blood, marriage, or adoption. Thus, it can be seen that even in an ordinance intended to remedy discrimination in housing, traditional families are given more protection than alternative families.

86. *Id.* at 4. The report does not indicate what type of abuse it was trying to prevent.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

false statement in the registration affidavit the right to bring a civil claim against the registrants to recover their losses, including reasonable attorney fees.<sup>91</sup> The alternative families would be required to pay a fee sufficient to cover the costs of registration.<sup>92</sup>

The M.E.O.C. retained the task force's recommendation that all employers in the City could not fire or refuse to hire an alternative family member based on his or her family status and could not discriminate in the extension of employment-based benefits.<sup>93</sup> However, the M.E.O.C. recommended that only the City be required to provide family insurance benefits to its employees.<sup>94</sup> The exemption was made to allow the City time to gather data on the financial impact of such an extension of benefits before imposing it on private employers.<sup>95</sup> The M.E.O.C. estimated that the annual cost to the City of providing these insurance benefits would be \$42,000 per year, with an unlikely possibility of ranging as high as \$122,000.<sup>96</sup>

The M.E.O.C. also noted that many private employers have conflict of interest or anti-nepotism policies which include roommates and lovers of an employee in the group excluded from certain relations with the employer.<sup>97</sup> Thus a double standard exists in employers' treatment of alternative families.<sup>98</sup> They are recognized as sufficiently "family-like" for an employer to apply its anti-nepotism policy against them, but they are not sufficiently "family-like" to be granted the same benefits and privileges received by traditional families.

The M.E.O.C. argued that Madison should take the lead in acting to end discrimination against alternative families, especially considering the number of Madison residents living in these families.<sup>99</sup> It noted that they are in committed relationships with other adults and are often raising families.<sup>100</sup> The M.E.O.C. report concludes by saying:

The EOC believes that it is time to recognize that in reality there are many ways in which human families are formed. It believes that many of the present protection against discrimination such as those who are gay or lesbian, those who are handicapped, those who are elderly,<sup>101</sup> and those who are in racial minorities, are meaningless if

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91. *Id.*

92. *Id.*

93. *Id.* at 5.

94. *Id.*

95. *Id.*

96. *Id.* at 6, 8 n.1.

97. *Id.* at 7.

98. *Id.*

99. *Id.*

100. *Id.*

101. The M.E.O.C. report noted the problems of unmarried elderly wanting to live together to reduce costs and handicapped persons wanting to live with their live-in attendants. *Id.* at 2. Often times restrictive zoning definitions prohibit these types of accommodations. The prevalence of this type of arrangement was documented in

those individuals cannot be protected from discrimination as families in addition to being protected as individuals. We urge the Common Council to adopt the alternative family rights ordinance.<sup>102</sup>

On August 2, 1988, the Madison Common Council enacted two sections of the proposed ordinance and tabled the remaining sections. The Common Council amended section 28.03(1) of the Madison General Ordinances to define "family" for zoning purposes to include "two unrelated adults and the minor children of each." It also amended section 3.36(15)(a)(2)(g) of the Madison General Ordinances to expand the definition of "immediate family" to include "[a] person designated in writing by the employee as a family partner or that partner's children, stepchildren, or grandchildren." Thus, city employees may now obtain paid absences from work for the death or illness of a member of their alternative family.

However, the Common Council refused to enact two broader amendments. The proposed amendment to section 3.23, the local Equal Opportunities Ordinance, would have outlawed discrimination on the basis of alternative family status in housing, employment, public accommodations, city services and credit. Alternative families were to be defined as "two adults and their dependents, if any" who had filed an affidavit with the City Clerk indicating a relationship of mutual support, caring and commitment. This amendment, as drafted by the City Attorney, would have required organizations selling memberships based on family status to provide the same benefits to alternative families.<sup>103</sup> It would have required the City as an employer to extend to alternative families the same benefits extended to families based on blood, marriage or adoption (including employer-paid family health insurance).<sup>104</sup> It would have prevented private employers from discriminating against alternative family members in decisions to hire or fire or in conditions of employment.<sup>105</sup> However, an exception would have exempted private employers from providing insurance benefits to alternative families, although they would have been required to provide equal benefits in all other areas, such as sick leave and bereavement leave.<sup>106</sup>

Once it was determined that the entire amendment to section 3.23 would not pass, an attempt was made to simply amend the section on public accommodations to include household memberships (open to two adults living as a household along with their dependent children, if any) whenever family memberships were offered. This amendment also did not pass.

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Smith, *supra* note 57.

102. *Id.* at 7-8.

103. § 3.23(5)(a).

104. § 3.23(6).

105. § 3.23(7).

106. *Id.*

Both were tabled and the sponsors expressed an intent to reintroduce these amendments in the spring of 1989. After six years of work by this author and countless others, this piecemeal adoption of two minor sections of the proposed ordinance was a disappointing result, even though the two amendments will have specific positive effects for numerous Madison residents living in alternative families.

These families have been guaranteed the right to live together as a family in neighborhoods with other families. The fact that an alternative family will now be the family next door is sure to broaden the lives of both the alternative families and their traditional family neighbors. Assuredly, traditional families' exposure to their alternative family neighbors will result in some consciousness-raising concerning alternate lifestyles and ways in which all families are similar to one another.

Additionally, City employees who are members of alternative families have gained the benefit of using their sick leave or bereavement leave to care and to grieve for their family members. These employees will no longer be forced to deny care to their family members during illness because they cannot take time off work or to lie to their employer about the reason for their absence. They will be able to take bereavement leave to mourn and to handle necessary arrangements for their family member's death. This type of recognition of one's family by an employer results in a better-adjusted, more content workforce.

Given the scope of the proposed ordinance, however, the Common Council rejected its opportunity to make meaningful change. The Council was presented with strong community support for the ordinance and, more importantly, clear evidence of extensive discrimination based on alternative family status. Enacting the proposed ordinance would have prohibited such discrimination and would have been a major step toward equalizing the benefits and protection enjoyed by traditional families and denied to alternative families.

But they refused to make such a move. They limited their changes to minor, relatively costless changes. Perhaps they felt it was too big a step to take; perhaps they did not find a broad enough coalition that supported such change; perhaps they yielded to opponents raising the specter of financial ruin and moral disintegration. More likely, the Madison Common Council, even this small segment of the patriarchy's legal system, retrenched and withstood this push for change. The minor amendments gave the impression that the system was responsive to the demands made upon it. The incremental advances renewed the commitment of some supporters to keep on fighting. But the momentum building in the community in favor of alternative family rights was finally halted: some participants dropped out in disgust with the process, some dropped out because results were achieved, and others dropped out because the energy and time expended had been too extensive to be maintained.

In order to understand the Madison experience of going to the le-



gal system, looking for change, and in the end achieving just enough change to legitimate the status quo, it is necessary to step back and look at the broader context. The patriarchy established and maintains the legal system for just this purpose. Activists' energy, time, and creativity are spent fighting for years through a bureaucratic and political maze to obtain minor changes in oppressive laws. Analysis of the Madison experience gains meaning by seeing it not as an isolated experience, but rather as another example of how the master's tools will not dismantle the master's house.<sup>107</sup>

## II. LAW AND PATRIARCHY

By seeing the Madison experience in context, one is able to grasp the full meaning of what occurred during the six years that reform for alternative families was sought in Madison, Wisconsin. Feminist activists working for change need to stop and appreciate the extent to which the patriarchy uses the legal system to perpetuate the status quo and to resist movements for genuine change in the way women are treated in this society. We must then decide how to allocate our time and energy between working within the system and working outside the system in order to reduce the patriarchy's power over women's intimate lives.

This section begins by examining how the legal system combines with societal pressure to coerce women into choosing the traditional nuclear family as the only acceptable form of intimate relationship. This coercion comes from giving recognition, protection and benefits to members of traditional nuclear families, while denying the same to women who define their family outside this accepted norm. Having chosen to benefit and protect the traditional nuclear family, patriarchal society and the legal system resist challenges to the status quo that would expand the definition of family to include alternative families. Thus, working within the system will result in expenditures of energy, time and creativity while attaining only minor changes, if any.

The section then looks at two examples of the legal system's resistance to expanding the definition of family which can be seen from the Madison experience. First, although given the opportunity to make wide-scale changes which would have granted benefits, such as health insurance, sick leave and bereavement leave to all alternative families in the city, the Common Council stopped at granting sick and bereavement leave benefits to City workers living in alternative families and not extending family health insurance to any alternative families. Thus, the Council refused to make those changes which would have given significant help to working class people. As the story of Janet and Cheri indicated, denial of these benefits meant a cost of \$200 a month for a family of six living on \$10,000 a year. This section examines how

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107. See *supra* note 22.

the legal process successfully resisted the expansion of benefits which would have resulted in the meaningful improvement in the financial health and security of alternative families. Although the extension of sick leave and bereavement leave to members of alternative families who are City employees will assist those families, the number helped is incredibly limited given the expansive alternative available to the Common Council.

Second, although encouraged to expand the definition of alternative families to include extended alternative families, the M.E.O.C. refused to even recommend such an expansion on the family definition to the Common Council. It ensured that any expansion in the definition of family would be limited to alternative families based on the nuclear family model. Thus, the broad definition of alternative family used by the Madison Task Force (two or more adults and their dependents) was repeatedly narrowed over years of deliberation and political compromise to its current definition (two adults and their dependents). This section examines how the legal process adulterated the original attempt to gain recognition and benefits for all families regardless of composition by narrowing the definition of alternative family to the patriarchal vision of family expressed by the traditional nuclear family.

Although a definition of family that does not differentiate between families based on the sex or marital status of the partners does improve the lives of countless individuals excluded by the current preference for the traditional nuclear family, it does not recognize many other alternative families, especially the nonblood-based extended families prevalent among people of color, working class people and gay men and lesbians. Limiting alternative families to two adults and their children still forces women into strict conformity with the nuclear family model so that unmarried heterosexual, gay, or lesbian couples become the only alternative families legally recognized.

This limited expansion in the definition of family appears to be as much progress as can be expected from working with the legal system.<sup>108</sup> This Article thus concludes by encouraging activists to resist this narrow definition of family because accepting such a definition requires the "selling out" of a truly feminist, non-racist, non-classist, challenge to the family definition currently recognized by the legal system and society. Thus, activists working for genuine social change, while working within the legal system to obtain recognition for alternative nuclear families, must maintain the energy and vision to work outside the legal system to continue the struggle against restrictions placed on family choice.

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108. *But see supra* note 7, referring to state court cases where the definition of family in those zoning ordinances was expanded to include extended alternative families.

*A. How the Legal System Coerces Women into Choosing Traditional Families*

The effectiveness of using the legal system to achieve changes of women's status in patriarchal society was questioned by Diane Polan in her work, *Toward a Theory of Law and Patriarchy*.<sup>109</sup> She argues that historically, and until very recently, the legal system has operated without even the appearance of fairness or equal treatment toward women and people of color.<sup>110</sup> Women and people of color have quite correctly viewed the legal system as an instrument of their domination and as an integral part of their subordination by society.<sup>111</sup> But the patriarchy has not limited its tools to the use of the legal system. In fact, Polan notes that "patriarchy has been primarily maintained not by legal means but by nonlegal forces and social institutions, in particular, the family."<sup>112</sup>

Polan goes on to argue that patriarchy and its henchman, the legal system, have not needed to use physical coercion to maintain male domination and female subordination.<sup>113</sup>

Throughout history, ideas about women, the family, and the relationship between women and the outside world have been effectively used to rationalize inequality and the inferior status of women. Patriarchal ideology has been successful to the extent that it has convinced women that our social, political, and economic subordination and our psychological feelings of inferiority are the result of natural forces rather than exploitative social relations . . . . [Patriarchy's] overall function—the legitimation of male supremacy—has remained the same.<sup>114</sup>

The use of social pressures and the legal system by the patriarchy has maintained male domination of women. The patriarchy uses these same social pressures and the legal system to maintain the traditional nuclear family as the only accepted family type and to keep individuals within socially acceptable relationship groupings.

In arguing that patriarchy has been maintained by non-legal forces and social institutions such as the family, Polan perhaps has not recognized that the family as commonly defined in American society (husband, wife, and children) has been primarily maintained by the

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109. Polan, *supra* note 19.

110. *Id.* at 299.

111. *Id.* Indeed, in the 1800s when the courts began recognizing women's individual rights as against their husbands, the judicial patriarchy "assured that women's domestic powers would not be translated into extensive external political and economic authority." M. GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA* 301 (1985).

112. *Id.* at 296.

113. *Id.* at 297.

114. *Id.*

legal system. The legal system perpetuates the traditional nuclear family by recognizing it as the "only" family and by locating benefits and protection in it. It limits access to these benefits and protection to those individuals who choose the traditional nuclear family as their primary intimate relationship. By so doing, the legal system effectively limits women's choices in making intimate relationship decisions or extracts a high price from those who refuse to be confined to that norm.

Heterosexual women who choose not to marry their male partner are engaged in a battle with the patriarchal legal system. Many of these women refuse to accept either the historical disability<sup>115</sup> or the current significance that law and society place on the institution of marriage or they refuse to marry simply because they do not want the legal system to become intimately involved in their personal relationships. Similarly, heterosexual women living in relationships with several adults of both sexes often choose to live communally in order to limit or reduce the patriarchal power that comes from partnering with one male. Additionally, many lesbians choosing to partner with one woman or several women do so to reject the power of the patriarchy and men in their personal lives. All these women, by making relationship choices outside the traditional nuclear family, are fighting against a complex web of legal protection and societal benefits that will be awarded to them only if they belong to a traditional nuclear family.

Even if a woman has no particular "political" reason for rejecting the traditional nuclear family as her choice for structuring her intimate relationships, she is dealt with by society and the legal system in the same way as those making a political challenge to the legal system. She is refused common, valuable protection and benefits and is made to see herself in a relationship that is "less than" the traditional norm.

In the same way that patriarchy and its henchman, the legal system, have not needed to use physical coercion to reinforce male power and female subordination, patriarchy and the legal system have not used blatant coercion to force women into choosing the traditional nuclear family as their primary intimate relationship. It is enough to restrict the definition of family to a husband, a wife, and their children. Thus, no one even assumes that any other composition is possible if a group is defined as a family.<sup>116</sup> If a woman chooses a male partner, and chooses to marry him according to the legal system's requirements, she will be given recognition, benefits and protection. Her children will also receive recognition, benefits and protection.

But if she chooses an "incorrect" family type, she loses all the

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115. For a description of this historical disability, including the married woman's inability to contract without her husband's consent, to enter a profession, to control her property or wages, to sue or be sued, or to obtain legal custody of her children, see Minow, *supra* note 2, at 828.

116. See *supra* notes 1-4 and accompanying text.

privileges she otherwise would have received. Her children also lose these privileges. Thus, the legal system does not need to forbid women from choosing to live in alternative families. The pure force of social custom and the threatened loss of legal benefits and protection act to "coerce" women into choosing the traditional nuclear family as their intimate relationship.

The patriarchal ideology that "family" means a husband, a wife and their children has convinced women that the only "real" family is the traditional, nuclear family. Just as the patriarchy succeeded in convincing women that their inferior political, economic, and social status resulted naturally from differences between men and women,<sup>117</sup> it has succeeded in convincing women that family means a relationship with a man blessed by marriage. Those who choose to live in alternative families hear the clear signal that they are not "really" living as a family and their relationship does not deserve the name "family."<sup>118</sup> This lack of recognition by society and the legal system serves to keep many women from even investigating alternatives to the nuclear family and exacts the price of "differentness" from those who live outside the norm.

Thus, the patriarchy will coerce some to enter these traditional relationships by means of peer pressure to be "the same as everyone else." It will coerce others by attaching too large an economic price to the choice of alternative family status. And it will ensure that those who live in alternative families will be reminded on a daily basis of their "anti-social" choice, by attaching a significant cost for doing so.

#### *B. Use of the Legal System Will Not Achieve Meaningful Change*

The success of social pressures and the legal system to legitimate the status quo can be seen from the use women and other oppressed groups make of the legal system and legal discourse in challenging patriarchal power in their lives. Janet Rifkin has noted that using legal strategies, such as legislation and litigation, as a means to challenge the power of the patriarchy has simply reinforced the legal system's legitimacy as the mechanism for resolving conflict and achieving social change.<sup>119</sup> The danger with asking the legal system to lessen its power over and control of women's lives is that by "upholding and relying on the paradigm of law, the paradigm of patriarchy is upheld and reinforced."<sup>120</sup> And thus the patriarchy simply maintains its domination and effectively decreases the likelihood that oppressed groups will seek more radical solutions to their subordinate status.<sup>121</sup>

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117. Polan, *supra* note 19, at 299.

118. See *supra* note 55 and accompanying text.

119. Rifkin, *supra* note 19, at 95.

120. *Id.* at 88.

121. Polan, *supra* note 19, at 300.

To the extent that those groups choose to articulate their social criticism and their grievances in the law's limited categories—"equal rights" and "equal opportunities"—and confine their action to litigation and lawmaking rather than struggle in such alternative arenas as the workplace, the family, and in organized religion, they are giving up the battle, because in so doing, they are tacitly approving the underlying social order and thus undermining more radical challenges to the overarching male supremacist and white supremacist structure of society.<sup>122</sup>

This same analysis can be applied to see how patriarchy and the legal system use the definition of family to restrict women's choices of intimate relationships, use social pressures to maintain continued acceptance of the traditional nuclear family as "the family," and divert activists' energy in the struggle for genuine change from radical solutions to legally articulable claims. For political activists wanting to end this patriarchal restriction and oppression, the question becomes what type of change will result from struggling within the system to expand the definition of family and what challenges must be made outside the legal system to recognize all alternative families.

For this political activist, who has spent over six years and hundreds, if not thousands of hours, working with the Madison Equal Opportunities Commission and the Madison Institute for Social Legislation to pass a comprehensive alternative family rights ordinance in Madison, Wisconsin, the question has become did we expect too much of the legal system and, by focusing our struggle within the system, have we weakened our ability to work outside the system and make a truly radical challenge to the patriarchal definition of family. Watching the proposed ordinance go through the political process, even at this small, city-wide level, I discovered both the limited extent to which the legal system can be used to achieve genuine change and the incredible facility with which patriarchal oppression based on class, race, and sexual orientation was maintained. What led to this discovery was participating in the political process to define alternative family for use in an ordinance which was intended to extend meaningful recognition, protection, and benefits beyond the traditional nuclear family.

First, it was watching the political process restrict extension of benefits from ones which would improve the economic stability of alternative family members working throughout the City in both the public and private sector to ones that only extended sick leave and bereavement leave to City employees living in alternative families. Inclusion of family health insurance for alternative families under employers' group plans was necessary to provide significant assistance especially to working-class families and people of color who disproportionately are also

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122. *Id.*

saddled with the burdens of economic class.<sup>123</sup>

As noted in my previous article, the cost to an alternative family of lost family health insurance can range up to \$4,400 per year.<sup>124</sup> For working-class and many middle-class alternative families, loss of employment-based family health insurance means the loss of family health insurance completely. It becomes an unaffordable luxury which remains out of reach. This loss can lead to the poor health and nutrition of family members, risk of a catastrophic injury or illness that will destroy the family's financial stability, and perhaps even destruction of the family or homelessness, all resulting from denial of a benefit freely given to, and expected by, traditional families.

In light of the importance of this benefit, the Common Council's refusal to extend family health insurance benefits to even the City's own employees shows a shocking disdain for alternative families and their needs. Additionally, by extending sick leave and bereavement leave benefits to City employees, the Common Council clearly recognized the importance of and need for those benefits. Its refusal to extend even these relatively costfree benefits to all employees within the City of Madison shows its virtually nonexistent commitment to meaningful change. From this vantage point, the extension of sick leave and bereavement leave benefits comes through as a minimizing, placating gesture at best, intended to alter the status quo just enough to make the legal system appear responsive while staving off more fundamental challenges to the patriarchy. It also clarifies the patriarchy's lack of concern for protecting those outside its accepted norm.

Second, it was also watching the political process narrow and restrict acceptable alternative families to fit the traditional nuclear model that led me to this conclusion, even more than only attaining very limited success in achieving change for alternative families. Granted, it was disappointing after the incredible time spent and the extensive community support achieved to simply obtain an expansion of the definition of family in the zoning ordinance and an extension of bereavement and sick leave benefits for the alternative nuclear families of city employees. This limited success, however, has left many activists convinced of the merit of making legal challenges for alternative families and prepared to seek continued extension of benefits to these alternative families in the future.

But watching how the legal system effectively rejected all but

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123. Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Decisions*, 62 MINN. L. REV. 1049, 1061 (1978).

124. See Cox, *supra* note 5, at 32 n.136 which explains that employees denied employer-paid family health insurance which is provided to traditional families but not to alternative families lose a benefit worth up to at least \$2,200 annually. The alternative family must then purchase family insurance at a cost of at least \$2,200 a year which results in a net cost of at least \$4400 per year and possibly as much as \$4,700.

those alternative families based on the nuclear family model led to my understanding of the ease with which the legal system serves to perpetuate patriarchal oppression based on race, class, and sexual orientation. At first blush, it seems unlikely that the political process of defining alternative family could raise significant questions of race, class, and sexual orientation. But further exploration shows that it did raise exactly those questions.

The M.E.O.C. task force recommended that the definition of alternative family consist of "two or more adults . . . together with their dependent children" although such a definition might make the ordinance more difficult to pass on a political basis.<sup>125</sup> The taskforce understood that it was important to include all families based on choice in the proposed definition and that a more restrictive definition would perpetuate the discrimination encountered by alternative families outside the nuclear family model.<sup>126</sup>

The issue turned on whether the definition of alternative family should be restricted to those alternative families that are based on "couple" relationships similar to the traditional nuclear family or whether it should include all groups that provide the same type of support, caring, love and involvement with other family members that is assumed to exist in the traditional family. In resolving this issue, the broader question arises of whether the legal system has the ability to move beyond a classist, racist, and homophobic system to acknowledge the true breadth of intimate relationships in existence among people today.

Besides those families based on lesbian, gay, or unmarried, heterosexual couple relationships, families are also based on the intimate, long-term relationships of three, four, five or more adults plus their dependents which are formed by individuals in search of expanded types of intimate relationships. An example of this type of family is seen in the California case of *City of Santa Barbara v. Adamson*, the zoning case where twelve individuals were living together in a supportive, committed relationship.<sup>127</sup> After being challenged by the City of Santa Barbara for violating its zoning ordinance, the family pursued its legal remedies all the way to the California Supreme court, which ruled that the right to privacy contained in the California Constitution protected that family from harassment by the Santa Barbara.<sup>128</sup> Families such as these are in existence across the country and often are composed of working class people and people of color.<sup>129</sup>

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125. TASK FORCE REPORT, *supra* note 11, at Section E, Minutes of November 15, 1984, at 1-2.

126. *Id.*

127. 27 Cal.3d 123, 164 Cal.Rptr. 539, 610 P.2d 436 (1980).

128. 27 Cal.3d at 129-30, 164 Cal.Rptr. at 542-43, 610 P.2d at 439-40.

129. *See Moore v. City of East Cleveland*, 431 U.S. 494, 508-509 (1977) (Bren-



As was stated before the Equal Opportunities Commission, for many people of color, an informal extended family is common practice.<sup>130</sup> Often intimate friends of a couple are included in the family with the honorary title of aunt or uncle. These adults support one another, take responsibility for child care within the extended family, and have the same type of intimate, committed relationship that is seen in the blood-related extended family.<sup>131</sup> Rather than being confined to including only blood relations in their extended family, these individuals base family membership on commitment and support, and they share the benefits and sorrows of the family group together.

Additionally, as was noted by the Supreme Court in *Moore v. East Cleveland*, the extended family has been a tradition of working class people and people of color for many years.<sup>132</sup> Oftentimes this type of extended family intimacy and connection was necessary to help individual family members deal with the pressures and problems associated with living in a classiest and racist society.<sup>133</sup> Extended family members were called upon to provide physical and emotional support to individual family members or to nuclear families within the extended family network.<sup>134</sup> When individuals or nuclear families could not financially support themselves due to the low wages, limited employment opportunities and discrimination regularly encountered by working class people and people of color, what has kept them from hunger, eviction, injury or physical abuse was provided, not by society, but by the extended family.<sup>135</sup>

To the extent that the extended family consists of blood or marital relations, they are considered family by this society and given recognition and some legal protection.<sup>136</sup> But to the extent that the extended

nan, J., concurring).

130. See *supra* note 60.

131. See Aschenbrenner, *supra* note 56, at 268 (discussing research indicating that the "fictive" extended family was necessary in slave communities because, with mother and father working in the fields, other adults in the community had to take over responsibility for the children). See also H. GUTMAN, *supra* note 56, at 220-21 (referring to research which shows that, in late medieval and early modern Europe, quasi-kin ties between adults made the social environment more stable). These quasi-kin obligations reinforced cohesion within social classes and led to social solidarity beyond the immediate family and kin networks. *Id.* at 221.

132. 431 U.S. 494, 500-503 (1977).

133. *Id.*

134. *Id.* at 509 n.6-9.

135. H. GUTMAN, *supra* note 56, at 448-449. Gutman cites the study of Crandall A. Shifflet on *The Household Composition of Rural Black Families: Louisa County, Virginia, 1880*, which indicates a close relationship between households and low economic status. *Id.* at 448 n. Shifflett argues that "the burden of poverty induced black families to rely on kinship networks and to become their brothers' keepers." *Id.*

136. However, extended traditional families do not receive all the benefits that traditional nuclear families receive. For example, Doug Meyer testified that he lives with his sister and his father. Both he and his sister have children who live with them

family consists of adults connected, not by blood or marriage, but by personal relationship and commitment, further difficulties are encountered. These difficulties range from problems caused by violation of zoning laws, such as in *Adamson*, to denial of access to hospital or jail visitation; inability to remove children from school, attend school functions, or obtain school records; and to the inability to use sick leave or bereavement leave to care for members of the extended family.<sup>137</sup>

While these problems are also encountered by middle-class, whites who have extended family relations with "unrelated" adults, the difficulties are accentuated when imposed on top of the discrimination already endured by people of color and working class people. Another group that also encounters this additional prejudice are the extended alternative families of lesbians or gay men. Oftentimes, "out" lesbians and gay men become distanced from their blood families due to homophobia and parental rejection and their partners are not recognized as "marital" family either.<sup>138</sup> These individuals and their partners often form intricate extended family relations with supportive friends in their own community.<sup>139</sup> A genuine expectation of support and mutual commitment exists in these relationships and this extended family of choice is used to replace the lost family of origin.<sup>140</sup> The same lack of recognition explained above also occurs for these families especially because their strong support and commitment to one another is often invisible to heterosexual society.

This invisibility and the lack of protection and recognition that results causes significant problems for the individuals involved. As was testified to at a M.E.O.C. task force meeting, one gay man involved in a "gay bashing" incident ended up in a local hospital in critical condition.<sup>141</sup> His partner and his extended family consisting of close intimate friends were not allowed to visit him or make choices for his medical care. Instead, the hospital contacted his blood family, with whom he had no connection because they had rejected him for his lifestyle, which was incompatible with his parents' fundamentalist Christian views. However, it was his parents, not his "family," who were recognized by the hospital and given authority to determine his medical care

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also. They tried to obtain one family membership to the YMCA for their entire family. They were not allowed to do so and were forced to buy three memberships instead (one for himself and his children, one for his sister and her children, and one for his father). TASK FORCE REPORT, *supra* note 11, at Section J, at 18-19.

137. See *supra* Section I, and the experiences related therein.

138. M.V. BORHEK, *COMING OUT PARENTS* (1983).

139. Clunis & Green, *Friends, Family and Sense of Community in LESBIAN COUPLES* 95-111 (1988); C. BECKER, *UNBROKEN TIES: LESBIAN EX-LOVERS* 155-161 (1988).

140. Clunis & Green, *supra* note 139, at 103.

141. TASK FORCE REPORT, *supra* note 11, at Section E, Minutes of January 19, 1984, at 1.

and treatment. Additionally, against the advice of his doctors, the man's parents removed him from the hospital to their home over 500 miles away. The parents refused to allow his Madison family to contact him at all.<sup>142</sup>

These problems and difficulties are behind the movement for the recognition of all alternative families regardless of the families' size or composition. However, even when organizations or municipalities have begun to recognize alternative families or domestic partners based on the coupling relationship of two individuals, either heterosexual or homosexual, there has been a complete rejection of the extended alternative family as it exists in society today.

After two years of discussion, the task force recommended an alternative family definition of "two or more adults . . . plus dependents,"<sup>143</sup> because it recognized the strong part that the extended alternative family plays in the lives of many alternative family members. Rather than simply adopting society's preference for the nuclear family based on a couple relationship along with any children of that couple, the task force determined that meaningful social change and reform in this area required recognition of all types of alternative families. It considered that its job would be incomplete if it imposed the nuclear family model onto alternative families.<sup>144</sup>

Despite this recommendation, the M.E.O.C. limited the definition to "two adults . . . plus dependents."<sup>145</sup> One reason for this change was a problem that the M.E.O.C. envisioned and that the task force had addressed and resolved. The M.E.O.C. and the task force envisioned substantial opposition from the insurance industry based on fears that one employee and his or her friends would join together as an alternative family simply to obtain coverage under the employee's health insurance.<sup>146</sup> To prevent this problem, the task force decided that in cases of extended alternative families, only one designated "spouse equivalent" would be eligible for health insurance coverage along with any children of that relationship.<sup>147</sup>

The insurance companies responded that this was inadequate to resolve the problem because even if only one additional adult were covered, it was still possible to choose the "sickest" person for coverage (a

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142. *Id.* For a similar problem encountered by a lesbian after her partner was critically injured and she was denied visitation rights, see K. THOMPSON & J. ANDRZEJEWSKI, *supra* note 9.

143. TASK FORCE REPORT, *supra* note 11, at Introduction, at 1.

144. See *supra* notes 67-70 and accompanying text.

145. Draft Ordinance Amendment, § 2 at 2.

146. However, some unmarried heterosexual couples decide to marry in order to obtain these and other benefits. In that situation, the insurance companies do not seem to be concerned.

147. TASK FORCE REPORT, *supra* note 11, at Section E, Minutes of April 19, 1984, at 4.

process known as adverse selection in the insurance industry) and insurance companies would thereby become responsible for potentially expensive health-care costs.<sup>148</sup> One way to resolve this whole issue would be through federal- or state-provided health insurance coverage for all individuals so that this potential for "fraud" could not be used as an excuse to negate the recognition of extended alternative families.

An additional concern that was raised by the M.E.O.C. was the concern of "huge" alternative families invading quiet, peaceful nuclear family neighborhoods and causing substantial noise, parking and other problems. However, under current zoning ordinances, there is no corresponding concern for the "huge" traditional family with eight, ten or twelve children invading these very same neighborhoods. Indeed, with the current zoning ordinances simply requiring relationships based on blood, marriage or adoption, the possibility of such invasions already exists. Not surprisingly, this concern has been raised only in the process of recognizing alternative families, not raised or voiced against traditional families. In any event, density zoning, which regulates housing occupancy on the basis of a specific space requirement for every person, rather than family definition, could be adopted in place of the current regulations to address this concern. Cities might also consider regulating noise, off-street parking or the number of units per acre in order to reduce the density of neighborhoods while not excluding alternative families.<sup>149</sup>

In reality, the major stumbling block to recognizing extended alternative families seemed to come from the inability of the Commission members to envision family to include more than Ward, June, Wally and the Beaver. While they did eventually show a willingness to admit that there are alternative families made up of heterosexual or gay and lesbian couples, they were unable to envision or understand the important place that extended alternative families play for countless individuals. The Madison Common Council exhibited this same inability as can be seen from the "two adults . . . plus their dependents" definition that was incorporated into the enacted ordinance. Perhaps part of their lack of vision or understanding can be explained by the supposition that they were offended that extended alternative families might receive more protection and benefits than traditional extended families receive. Perhaps it was simply an unwillingness to address the difficult, but resolvable, problems that would have to be resolved if family were to mean more than two adults plus children.

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148. *Id.* at Section E, Minutes of June 21, 1984.

149. Netter & Price, *Zoning and the Nouveau Poor*, A.P.A. J., Spring 1983, at 171, 175.

## CONCLUSION

As the previous section has illustrated, the process of using the legal system to extend meaningful benefits to all alternative families runs afoul of the patriarchy's classist, racist and homophobic beliefs. Given this experience, will activists obtain genuine change by working within the system, and if not, do we reject the system and make our challenges from outside the system? If we work outside the system, what avenues do we take and what results can we expect?

At this point, after six years of continuous struggle and controversy, my viewpoint is that the legal system cannot, or perhaps more importantly, will not, fully accept that all alternative families, even those outside the nuclear family norm, are entitled to the recognition, protection and benefits that traditional families receive, including those with price tags attached. Activists cannot expect responsiveness from the legal system because it is patriarchy's henchman and the patriarchy is committed to retaining the traditional family as the only accepted definition of family in patriarchal society.

But, at the same time, we must acknowledge, as others fighting for change before us have acknowledged, the legal system is a powerful tool of the patriarchy. If change can be obtained within the system, it can have immediate and far-reaching results for those oppressed by the status quo. In Madison, use of the legal system has resulted in gaining some recognition and benefits for many alternative families. If nothing else, Madison residents have been exposed to continuous news stories about alternative families.<sup>150</sup> Part of the community has had its consciousness raised on the issues and problems confronting alternative families. Working within the system, even when legal reforms fail, can serve the feminist enterprise as well.<sup>151</sup> When attempts to obtain fundamental rights for all fail, as with this attempt to obtain benefits for all alternative families, the hypocrisy of the legal system is exposed.<sup>152</sup> We have thus gained the opportunity to point out this inequality and to organize and mobilize alternative families toward political action.<sup>153</sup>

Although we have begun to achieve some small recognition of the variety of family types in existence, we have not come close to reaching the goal of ensuring equal treatment of all families regardless of their composition. Even equal treatment within the legal system is not

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150. A limited recounting of stories on alternative families in Madison newspapers includes stories in OUT! in July, 1983; The Daily Cardinal on February 17, 1984; OUT! in May, 1984; OUT! in July, 1984; OUT! in December, 1984; OUT! in January, 1985; Isthmus on May 31, 1985; The Capital Times on May 31, 1985; The Capital Times on February 14, 1987; and The Capital Times on April 28, 1988. Countless other articles also appeared in all Madison newspapers.

151. See Littleton, *supra* note 45, at 5.

152. *Id.*

153. *Id.* at 6 n.20.

enough. For as Polan states, obtaining equality within this system simply serves to legitimate the system.<sup>154</sup>

I agree with Polan and Rifkin that going to the legal system means going to the patriarchy and asking the patriarchy for genuine change. The patriarchy will resist and while resisting, it will try to outlive the momentum and efforts of activists seeking change. That is what happened in Madison.

A small group of activists representing a broad coalition of interests convinced the M.E.O.C. that discrimination existed and needed to be ended. We presented material from other cities showing responses by those cities, by employers and by organizations to the needs of these oppressed groups. Because the M.E.O.C. believes that working within the system will result in genuine change, it agreed to study the feasibility of implementing an ordinance which would ban discrimination against alternative families.

The activists involved in this challenge to the patriarchy spent hundreds of hours in the basements of various city buildings, in restaurants, and in drafty classrooms motivated by the ideal of change. It had worked elsewhere; it would work in Madison.

We organized and we theorized. We were savvy about the place politics would play but were also responsive to our coalition and knew we needed to attempt as far-reaching change as was possible. So we held on to the ideal of obtaining an extension of family health insurance benefits and defining alternative families to include extended alternative families because we saw a need and we responded to it.

We were willing to seek change within the system. We knew that seeking this kind of legislation would mobilize our communities and we thought that the chance of meaningful change was worth the effort.

What we did not realize was the extent to which the patriarchy's legal system would resist change. And here we were naive. We thought that a well-documented showing of discrimination, a thorough gathering of supporting documents, and strong community support would achieve the result we desired—genuine change to end discrimination of all types against all alternative families.<sup>155</sup>

But we did not correctly estimate the strength of the patriarchy to resist us. We did not comprehend the extent of the threat we presented to the status quo. Recognizing diverse families meant a step toward challenging all the other assumptions underpinning the patriarchy's allocation of power, money and justice. Now reality has hit us in the face and we can no longer pretend that working within the legal system will result in extensive meaningful change.

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154. See Polan, *supra* note 19, at 300.

155. At least, we wanted an end to all types of discrimination over which the city had control. We recognized that ending some types of discrimination was beyond the City's power. See *supra* note 6.

As long as the challenge is not too significant, the legal system may be responsive. Responsiveness in the face of enough community support is required to maintain the appearance of justice. The progress we have made with various cities, with various employers, and with various organizations are points at which we have raised legally articulable claims and beaten the system at its game. It had no choice but to bend in these instances.

But this method will not dismantle the master's house because, by going to the legal system, we use the master's tools. We must throw down the master's tools and use our own means to raise a challenge to the patriarchy.

And so while activists in other cities may want to keep their sights on legal means of achieving recognition for alternative families, we must go farther. We can take different tacks both inside and outside the system. Encouraging political candidates to support alternative family rights when there is constituent support for it will result in getting supporters on the decision-making bodies. For example, Alderperson Jim McFarland was elected to the Madison Common Council after a campaign based on strong support for the alternative families ordinance. After becoming part of the Council, McFarland became one of the ordinance's chief sponsors and drafted the M.E.O.C. report recommending passage of the ordinance by the Common Council.<sup>156</sup>

Additionally, we must take our struggle outside the formal system and into the streets, homes, workplaces and communities of this society. As was seen by the civil rights movement of the 1950's and 1960's and by the anti-war movement of the 1960's and 1970's, agitating in the streets of our communities will help spread understanding of, and support for, a change in society's definition of the family. Numerous communities around the country already have annual "gay-pride" parades held in recognition of gay men and lesbians. These parades could expand their concerns to include a call for recognition of the alternative families formed by gay men and lesbians. Organizing other supportive individuals and organizations, such as labor unions, feminists, working class people, and people of color, could result in other marches and demonstrations calling for recognition of alternative families. Raising these issues in our community groups and organizations may lead to developing support and pressure for a change in alternative families' status in society.

Those of us who live in alternative families must also embrace these families, whether nuclear or extended, and tell one another, our families of origin, and our friends, that this is our family. We must demand recognition from ourselves and our friends. Only by developing this self-recognition will we gain the strength and commitment to or-

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156. See REPORT OF THE EQUAL OPPORTUNITIES COMMISSION, *supra* note 44.

ganize and agitate for recognition from society. As long as we allow ourselves to feel "less than" traditional families, as long as we reserve the name "family" for our family of origin and not our family of choice, we will not have the fortitude necessary for an on-going struggle with the patriarchy.

We must work with our colleagues and co-workers to obtain employment-based protection and benefits from our employers. We must talk to each other about the disparity resulting from benefits given to some families and not others, to some employees and not others, depending on family composition. We must place extension of benefits to alternative families on our agenda for individual negotiations and collective bargaining.

Through all this, we must mobilize ourselves and our communities to press for genuine change. For if we do not apply the pressure, we will not achieve change. The patriarchy will ignore our needs as long as it is allowed to do so. We cannot obtain change within the system without first organizing, agitating, and creating conditions for change outside the system. Only by extra-legal, broad-based efforts will we ever effectively challenge the patriarchy and its legal system to recognize and protect all families, regardless of composition.



